

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNITCIVIL DIVISION
Docket #:

PICKET FENCE PREVIEW, INC.,

Plaintiff,

vs.

ZILLOW, INC.,
Defendant.USDC - DVT
2:21-cv-12**COMPLAINT**

NOW COMES the Plaintiff, Picket Fence Preview, Inc., by and through its attorneys, Bauer Gravel Farnham, LLP, 401 Water Tower Circle, Suite 101, Colchester Vermont and complains as follows:

PARTIES

1. The Plaintiff is Picket Fence Preview, Inc. (hereinafter Picket Fence). Picket Fence is registered with the Vermont Secretary of State as a Domestic Profit Corporation and its principal place of business is 1 Kennedy Drive # L-5, located in the City of South Burlington, County of Chittenden and State of Vermont.
2. The Defendant is Zillow, Inc. (Zillow) which is registered to do business with the Vermont Secretary of State. Zillow is listed as a Foreign Profit Corporation with its principal place of business as 1301 Second Avenue, FL 31, in the City of Seattle and State of Washington. It lists its registered agent in Vermont as CT Corporation System, with address 17 G W Tatrow Dr., Jeffersonville VT 05464. Zillow, Inc. is a wholly owned subsidiary of Zillow Group, Inc.
3. Pursuant to 12 V.S.A. § 402(a) venue is proper in the Vermont Superior Court, Chittenden Unit as the Plaintiff is a resident of the County of Chittenden in the State of Vermont. The Vermont Superior Court has concurrent subject matter jurisdiction to adjudicate claims of unfair competition brought under the Lanham Act.

BACKGROUND

4. Plaintiff realleges each and every allegation set forth in the previous paragraphs and incorporates them herein into this count by this reference.

5. Picket Fence is a For-Sale-By-Owner publication business. Picket Fence started in 1993. Picket Fence was one of the first publications to provide a marketplace where private homeowners pay to advertise their property directly to potential buyers, bypassing the use of real estate agents and brokers.

6. A major incentive for homeowners to advertise with Picket Fence Preview is reaching potential buyers directly through their publications and avoiding a 6-8% real estate commission.

7. Zillow was incorporated in December of 2004 and provides an online portal for people to advertise property and realtor services for the general public. Zillow launched its website, Zillow.com, in February 2006.

8. One of their services for agents includes advertising and a placement service for Premier Agents. Zillow's business depends on its ability to attract advertisers and partners to its online portal. This includes creating an advertising network and providing leads to its Premier Agents.

9. Zillow has updated this practice to increase the incentives to Premier Agents by introducing a new service offering called "Flex". This allows agents to pay Zillow only after they close a transaction from a Zillow lead, such as redirecting a For-Sale-By-Owner advertisement to a Premier Agent.

10. Part of Zillow's practice has included deceiving For-Sale-By-Owner's to list their property on its site for "free." This deception can be seen when comparing a property listed by an agent to a For-Sale-By-Owner listing.

11. When a For-Sale-By-Owner has a listing on Zillow's service, the initial page that a potential buyer sees is a big bar below that says "Contact Agent" prominently displayed. To find the seller's contact information a potential buyer must go to "Get More Information." When the section listing "Get More Information" on a For-Sale-By-Owner page comes up, the "Premier Agents" are listed first and the owner is listed at the bottom of the list.

12. The deceptive disclaimer on displayed For-Sale-By-Owner ads was added in 2017 (11/27/17). This disclaimer on the For-Sale-By-Owner ad, viewable to a user (buyer), is also deceptive in that the small text of the disclaimer refers to a “contact agent” button, yet the only option displayed is a “contact” button. Selection of the “contact” button on a For-Sale-By-Owner ad is routed to Zillow and a Premier Agent. There is, and never has been any disclosure of inquiry diversion (hijacking of inquiries) to the poster of a For-Sale-By-Owner ad on Zillow.

13. On some listings the only way to find the phone number for the owner is to scroll through all of the information, including past a page allowing for contact with an agent as well as a section showing nearby properties and similar homes. The prominently displayed blue “Contact Agent” link continues to be prominently displayed at the top of the page as a person scrolls through the listing.

14. There is also a link on the For-Sale-By-Owner ad informing Premier Agents how to pay to get their name on this listing, or to be the only contact on the listing. If one were to press the “Contact” button, the person is then contacted by an Agent or Zillow, not the Property Owner.

15. In the section listing “Get More Information” one can enter their contact information to express an interest in the property. Below the “Contact” box and after a disclaimer it lists the names of Premier Agents first, with the property owner last. Even if one checks the owner box the response goes to the Zillow who connects the buyer with an agent. Though it is possible to find a way to contact the property owner, Zillow’s website makes this difficult and clearly promotes the Premier Agents.

16. For-Sale-By-Owner ads on mobile devices (cell phones, tablets) often do not have any owner contact info, unless the owner remembers to include this in the description of the property or scrolls through the entire ad to find the owner’s number at the end of the advertisement. Only Premier Agents can be contacted directly by clicking on contacts in the ad.

17. Similarly if you view a For-Sale-By-Owner listing on a cell phone, a prominently displayed “Call Agent” or “Message Agent” is prominently displayed at the bottom on the screen even while scrolling through portions of the listing.

18. When one comes to the place where it says "Get More Information" clicking on this button does not contact the seller of the property, rather it connects the buyer with Zillow or a Premier Agent.

19. Zillow has been engaging in unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, both of which have been declared unlawful and are considered antitrust violations.

20. Zillow is engaged in a comprehensive program designed to undermine the For-Sale-By-Owner real estate market using deceptive business practices, false advertising, consumer fraud, deceptive marketing, unfair trade practices and unfair competition.

21. Specifically Zillow has been offering free advertising postings to For-Sale-By-Owner sellers of real estate while providing deceptive layouts of the For-Sale-By-Owner ads to the benefit of Zillow's Premier Agents. Essentially Zillow has falsely advertised its services to For-Sale-By-Owner sellers and hijacked the inquiries on these For-Sale-By-Owner listings for Zillow's own gain by tying the free advertisement listing to the sale of advertising to Premier Agents.

22. The result has been that Zillow has both deceived the For-Sale-By-Owner sellers who have advertised the property on Zillow's site as well as engaged in unfair methods of competition to the detriment of For-Sale-By-Owner advertisers and publications, such as Picket Fence Preview, which has provided paid advertising for them.

23. Furthermore, there are instances in which only the Premier Agent contact information is displayed on For-Sale-By-Owner ads. Clearly, Zillow actively engages in malicious and fraudulent bait and switch behavior to the benefit of itself and its paying Premier Agent clients, to the detriment of the property seller, their buyer, and legitimate For-Sale-By-Owner advertising businesses like Picket Fence Preview.

24. In fact, Zillow advertises to agents 'learn how to be the only agent listed here' on For-Sale-By-Owner listings. Such advertising, and the hijacking of inquiries on For-Sale-By-Owner, ads is deceptive to the For-Sale-By-Owner seller who lists their property on Zillow's website and the buyer who searches for For-Sale-By-Owner property on Zillow's website.

25. Zillow has engaged in illegal and unfair methods of competition as well as fraud and deceit by setting up a bait and switch scheme for Zillow's "free" listings for

For-Sale-By-Owners and then making it difficult, or impossible, for prospective buyers to contact those seller's directly.

26. For-Sale-By-Owner also may lose potential sales from this “free” ad, because Premier Agents may redirect potential purchasers to other properties if the For-Sale-By-Owner is not willing to share a commission with the Premier Agent.

27. Plaintiff is also informed, and therefore believes, that Premier Agents may redirect potential buyers to other properties where Premier Agent will obtain a better commission.

28. Zillow’s pricing scheme is also predatory, in that Zillow claims it is offering a service for free, but in reality is charging the Premier Agents so they can advertise on the website of those free ads and receive hijacked inquiries from deceived buyers.

29. This creates an unfair playing field for legitimate For-Sale-By-Owner publications. Potential customers have opted for the free listing of their properties on Zillow’s site instead of using Picket Fence Preview, a For-Sale-By-Owner paid advertising publication.

30. The predatory pricing engendered in offering this service for free means that Picket Fence Preview, a For-Sale-By-Owner publication cannot compete.

31. Zillow's predatory pricing scheme resulted in many deceived consumers over the years.

32. Hundreds of thousands, to potentially several million customers, who listed on Zillow thought they were getting free For-Sale-By-Owner advertisement, but instead paid a real estate agent an unnecessary fee to obtain access to people who viewed THEIR For-Sale-By-Owner listing on Zillow.

33. This includes buyers deceived into paying unnecessary fees to agents because their inquiry was diverted to an agent, and sellers who've been deceived into paying unnecessary fees because Zillow hijacked the buyer inquiry to an agent who then controlled the transaction.

34. The unfair competition, by offering a bait and switch free advertising, has meant a significant loss in revenue for Picket Fence Preview, a For-Sale-By-Owner publication. In the case of Picket Fence Preview this has meant a loss in the millions of dollars.

35. In reviewing Zillow’s For-Sale-By-Owners listings Zillow has made it difficult, and in many cases impossible, for potential buyers to contact the For-Sale-By-Owner seller directly. Zillow also illegally recoups the cost of these “free” For-Sale-By-Owner ads by

allowing Zillow's Premier Agents to be the only contact on the For-Sale-By-Owners' listing. This means that the only contacts the For-Sale-By-Owners get from Zillow's website forces them to go through real estate agents instead of directly to the For-Sale-By-Owners.

36. These For-Sale-By-Owners then end up having to pay a commission in order to get a lead on the purchase which came directly from Zillow's website. Instead of paying a modest fee to publish their listing in the Picket Fence Preview magazine and on their website, the deceived customer ends up paying 3% or more in commissions on the sale of their property.

37. On a \$350,000 property, that is a loss of \$10,500 at a 3% commission rate. Essentially Zillow has hidden the fee from the For-Sale-By-Owners and deceived them into believing by listing their property on Zillow's site they would avoid commissions. Zillow baits the consumer with a "free" For-Sale-By-Owner ad and switches it into an ersatz real estate listing by diverting inquiries intended for the owner to real estate agents who pay Zillow for those inquiries.

38. The actions by Zillow are unlawful because it engages in both anti-consumer bait-and-switch tactics by providing "free" advertising for For-Sale-By-Owners and anti-competitive practices by unlawfully undercutting the prices for legitimate For-Sale-By-Owners advertising.

39. Zillow destroyed the competitive market for For-Sale-By-Owner sellers paid advertising by unlawfully shifting the cost for the advertising from the For-Sale-By-Owners sellers to the Premier Agents and other Agents advertising on Zillow's site. It hid the new higher cost to the For-Sale-By-Owner sellers, who were now hit with unexpected realtor fees.

40. These real estate agents in turn profited from Zillow's scheme by Zillow's redirecting the buyer inquiries that should have gone to the For-Sale-By-Owners sellers to the Premier Agents who were paying Zillow to deceptively divert potential customers to them.

41. People who sell property as For-Sale-By-Owner do this to avoid paying a commission to a real estate agent. The "free" For-Sale-By-Owner ad offered by Zillow baited the seller into placing the ad, which Zillow then switched to an expensive real estate listing by virtue of hijacking the inquiries to real estate agents that paid Zillow to receive those inquiries.

42. Zillow recouped the "cost" of the "free" ad by fees paid to Zillow from the agents receiving those hijacked inquiries.

43. Plaintiff is informed, and therefore believes, the estimated cost of this bait and switch scheme Zillow has illegally caused the diversion of millions of dollars in Vermont, New Hampshire, and New York and hundreds of millions of dollars nationwide since 2006 from unsuspecting For-Sale-By-Owners and their buyers.

44. Prior to Zillow offering free For-Sale-By-Owner listings on its website, Picket Fence Preview was enjoying dynamic and consistent growth. This included Picket Fence Preview beginning to expand and franchise its business model.

45. There were also numerous other For-Sale-By-Owner publications across the country. Currently Picket Fence is one of the last remaining For-Sale-By-Owner publications. It continues to lose market share due to the bait-and-switch advertising offered by Zillow.

46. The practice by Zillow is unlawful as an unfair method of competition in commerce and unfair or deceptive acts or practices in commerce. It is also immoral behavior and is the kind of action that Antitrust regulations were aimed at protecting the public and competitive business from.

47. Zillow's act of leading For-Sale-By-Owners to believe they are getting a free ad to avoid paying a commission to a real estate broker is deceptive. Rather, Zillow makes it so potential buyers are directed to real estate agents, instead of being put directly in contact with the seller of the property. Essentially, thwarting the entire purpose of the seller of the property who was trying to avoid a commission for the sale of their property.

48. These sellers thus end up paying a significantly higher cost to sell their property than if they had listed it with a traditional For-Sale-By-Owner publication, like Picket Fence Preview.

49. Through Zillow's illegal actions Zillow has disrupted and perverted the entire For-Sale-By-Owner real estate marketplace, deceiving and defrauding both the seller and buyer of significant savings of the For-Sale-By-Owner real estate market as well as the businesses that provide legitimate advertising services to that market.

50. From the inception of Picket Fence's business to 1994, Picket Fence showed a steady increase in gross revenue and profits. Due to the nature of its business, increases in business did not create a significant increase in costs. This is because adding pages to their

publication and adding listed properties to their website did not increase their costs proportionally. Thus as they obtained more customers, their profits increased.

51. This loss can be easily tracked by viewing its historical revenue. Between 1994, its first full year of operation, and 2006, prior to the introduction of “free” For-Sale-By-Owner advertising by Zillow, Picket Fence Preview revenues grew at a compounded annual rate of 16% per year. Revenues initially grew slowly from 1994 to 2002, at a rate of 11.4% per year. However, from 2002 through 2006, revenue grew at an accelerated rate of 21.7% per year, but then began to decline almost every year thereafter.

52. In 2006, Picket Fence Preview had profits of approximately \$788,000. Their lost profits in 2017 is estimated at \$3,400,000 and at a projected 16% growth in profits from 2018 to 2030, Picket Fence Preview would have over \$128,467,758.50 in profits, calculated based on present value. That means by 2030 Picket Fence Preview estimates it will have lost over \$142,000,000 as a result of Zillow’s false advertising and unfair and deceptive practices.

53. Other losses include losses associated with potential expansion to other markets through company owned outlets and franchising fees that Picket Fence Preview could have charged but for the unlawful actions of Zillow.

54. Prior to 2006, Picket Fence Preview had started to work with others who wanted to start For-Sale-By-Owner advertising publications. Unfortunately due to the downturn in income for legitimate For-Sale-By-Owner advertising publications as a direct result of Zillow’s false advertising and unfair and deceptive practices, Picket Fence Preview was unable to fully develop that business model. Its losses from expansion and franchising are clearly in the hundreds of millions of dollars.

55. Zillow’s deception of offering For-Sale-By-Owner ads for free were likely to influence For-Sale-By-Owner conduct by distorting their ultimate exercise of choice. The representation by Zillow had the capacity or tendency to deceive a For-Sale-By-Owner to the detriment of Picket Fence.

56. The “free” listing Zillow offers deceives For-Sale-By-Owners since what Zillow was really doing was providing a forum for Premier Agents, who pay Zillow, to steal potential buyers from contacting the For-Sale-By-Owners directly. By hijacking the inquiries on For-Sale-By-Owner ads and sending them to Premier Agents, Zillow deceives and defrauds the consumer.

57. Zillow deceives and defrauds the seller who posted the free For-Sale-By-Owner ad as it steals this ad making it neither For-Sale-By-Owner nor free.

58. Zillow deceives and defrauds the potential buyer who inquired on such ads as the ad is not For-Sale-By-Owner since Zillow diverts this inquiry to paying real estate agents. Zillow's actions violated both the spirit and intent behind Vermont's Consumer Protection Act.

59. All of the actions by Zillow injured Picket Fence, because sellers and buyers are forced to pay a commission on the sale instead of a fully disclosed fixed price for advertising in Picket Fence.

60. Zillow's subsequent monetization of this engineered deception is not transparent to those who advertise, thus preventing them from making a choice to use other services that charge a reasonable rate for their services.

61. Zillow's actions were to promote Zillow's business at the cost of For-Sale-By-Owner consumers and this also had a direct effect on legitimate For-Sale-By-Owner businesses such as Picket Fence.

Count I

Violation of the Vermont Consumer Protection Act

62. Plaintiff realleges each and every allegation set forth in the previous and following paragraphs and incorporates them herein into this count by this reference.

63. Zillow's actions are a violation of the Vermont Consumer Protection Act and Picket Fence Preview has suffered as a result of Zillow's actions.

64. The Vermont Consumer Protection Act prohibits unfair and deceptive practices in commerce. The Consumer Protection Act provides that "[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 9 V.S.A. § 2453(a).

65. Zillow engaged in unfair and deceptive acts and practices in violation of the Vermont Consumer Protection Act because (1) it made representations likely to mislead a consumer; (2) the For-Sale-By-Owner interpreted the representations reasonably; and (3) the representation had the capacity to affect For-Sale-By-Owners or others seeking to purchase

property being sold by For-Sale-By-Owner properties and where to spend advertising dollars to list their properties. This had a direct impact on Picket Fence's income.

66. Picket Fence is not required under the Vermont Consumer Protection Act to prove damage or intent.

67. The purpose behind Vermont's consumer protection laws is to protect this state's citizens from unfair and deceptive business practices and to encourage a commercial environment highlighted by integrity and fairness. Zillow's offering of a free For-Sale-By-Owner ad that is not free is deceptive and fraudulent.

68. Zillow's actions constitute an antitrust violation that has hurt Picket Fence.

69. Pursuant to Title 9 V.S.A. § 2465 Picket Fence has a cause of action under the Vermont Consumer Protection law as it sustained damages or injury as a result of a violation of State antitrust laws, including 9 V.S.A. § 2453, and it thus may sue and recover from Zillow the amount of its damages, reasonable attorney's fees and exemplary damages.

Count II

Violation of the Lanham Act

70. Plaintiff realleges each and every allegation set forth in the previous and following paragraphs and incorporates them herein into this count by this reference.

71. Zillow, in connection with services in commerce provided to For-Sale-By-Owners, provided false or misleading representations of fact which as part of a commercial advertising program and promotion misrepresented the characteristics of the services they provided.

72. Zillow provides services in interstate commerce. Its business is centered around an internet service which provides information on real estate properties in every state in the United States.

73. It has provided false or misleading statements by claiming to provide free advertisements to parties selling their own homes, which are commonly referred to as For-Sale-By-Owners. Unknown to the sellers advertising on Zillow, potential buyers are directed to Zillow's Premier Agents instead of to the seller who is trying to sell the home on their own.

74. The owners of properties trying to sell real estate without having to pay a commission are deceived or likely to be deceived when they list the property for sale on Zillow for free. Many of these sellers are unable to connect with potential buyers and forced to pay commissions to real estate agents to obtain the names of potential buyers.

75. If sellers of property were informed that their advertisements were being diverted by Zillow they could have chosen a competitive service such as Picket Fence for advertising, which facilitates direct contact between a potential buyer and the seller.

76. The offering by Zillow of “free” advertisement listings for individuals choosing to sell their property without a realtor has impacted and caused injury to Picket Fence and adversely affected its ability to continue to expand its business.

77. The actions by Zillow have caused, continue to cause, and will cause in the future, significant financial injury to Picket Fence. Picket Fence knows individuals who were specifically deceived by the “free” promotion by Zillow who have indicated that they would have used Picket Fence to advertise had they known the truth about how Zillow directs potential buyers to real estate agents.

78. The offer by Zillow of “free” advertising was designed to influence the purchasing decisions of For-Sale-By-Owners to use their service as opposed to other advertising services which did not engage in bait-and-switch tactics with their customers.

79. Picket Fence has suffered a loss in advertising revenue as a direct result of Zillow offering the bait-and-switch “free” ads to For-Sale-By-Owners and is aware of individuals sellers who would have advertised with them if they had known the truth about how the “free” ads work.

80. Plaintiff is informed, and therefore believes, that sellers who advertise are not aware of the diversion, because they do not see the same information that potential buyers see when viewing the “free” ads. Specifically, they do not see the listing of Premier Agents on their account.

81. Plaintiff is informed, and therefore believes, that all individuals who select the Property Owner and press the “Contact” button will be called by Zillow and directed to a “Premier Agent.” A disclaimer, added in 2017, in small print reads as follows:

By pressing Contact, you agree that Zillow Group and its affiliates, and real estate professionals may call/text you about your inquiry, which may involve use of automated means and prerecorded/artificial voices. You don't need to consent as a condition of buying any property, goods or services. Message/data rates may apply. You also agree to our Terms of Use. Zillow does not endorse any real estate professionals. We may share information about your recent and future site activity with your agent to help them understand what you're looking for in a home.

82. Premier Agents pay a fee to appear in ads of homes advertised for sale on Zillow. Buyers attempting to contact someone about the property are first screened and contacted by Zillow and Zillow will put the potential buyer in touch directly with an agent. Zillow is thus directly involved in the bait-and-switch and the diversion of potential buyers from sellers.

83. Zillow advertises that For-Sale-By-Owners are able to post a listing for free, including video and unlimited photos. The offer includes listing your home on both Zillow and Trulia and that home shoppers will receive instant emails about new listings.

84. Individuals who list on Zillow are told that potential buyers will contact them through the email address they use to register on Zillow and that they must also add a phone number to the listing. However, Zillow does not inform potential sellers that individuals who select the "Contact" button when interested in a property, will first be directed to a Zillow representative who will then connect the potential buyer with a Premier Agent, who pays for the connection.

85. Zillow makes money off the For-Sale-By-Owner listings by promoting real estate agents who have paid to be Premier Agents and directing potential buyers to these Premier Agents. For-Sale-By-Owners who list their property are not informed of this and thus lose direct access to potential buyers and often end up having to pay a commission to a Premier Agent to obtain contact to the buyer who saw their ad on Zillow.

86. Zillow thus makes a profit from this advertising scheme to the detriment of Picket Fence Preview and the bait-and-switch tactic, which are unfair methods of competition and unfair and deceptive practices in commerce, prevents For-Sale-By-Owners from advertising on Picket Fence because they believe they are receiving free services, instead of having to pay for services on Picket Fence.

Count III

Unfair Competition

87. Plaintiff realleges each and every allegation set forth in the previous and following paragraphs and incorporates them herein into this count by this reference.

88. Defendant has offered free advertising by using a bait and switch tactic to For-Sale-By-Owners and undercutting the price for legitimate advertising offered by Plaintiff.

89. This has caused harm to the Plaintiff because they have lost advertisers and the ability to expand and grow their business.

90. The Defendant's bad faith is evidenced by its efforts at promoting the "Premier Agent" program at the expense of the For-Sale-By-Owners and the to the detriment of the Plaintiff.

WHEREFORE, Plaintiff prays the Court grant the following:

1. Award the Plaintiff a jury trial on all issues triable to a jury;
2. Award the Plaintiff damages for violations of the Vermont Consumer Protection Act, including all damages, triple exemplary damages, attorney's fees and costs;
3. Award the Plaintiff damages for all violations of the Lanham Act, including profits made by Zillow for its conduct;
4. Award the Plaintiff damages for Zillow's unfair competition;
5. Grant the Plaintiff a permanent injunction against Zillow to prevent it from future violations and engaging in bait and switch tactics;
6. Award any other and further relief as the Court deems just and proper.

Dated at Colchester Vermont this 16th day of December 2020.

Bauer Gravel Farnham, LLP.
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